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December 1, 2010

REQUEST FOR REVIEW

VIA ELECTRONIC DELIVERY

Docket Number: 02-6

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

APPEAL OF UNIVERSAL SERVICE ADMINISTRATIVE COMPANY DECISIONS

October 6, 2010 Funding Commitment Decision Letters
October 19, 2010 Notification of Commitment Adjustment Letters

Billed Entity: East Central BOCES

Billed Entity Number: 142296

Contact: Floyd E. Beard, Executive Director
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CHART OF USAC DENIALS AND RESCISSIONS

Date of Letter from USAC	Funding Year	471 Number	FRN	Amount Denied	Amount to be Recovered
October 6, 2010	2010-2011	728350	2060457	\$716,860.06	
October 6, 2010	2010-2011	728369	2058334	\$7,977.11	
October 6, 2010	2009-2010	653350	1804812	\$677,580.06	
October 6, 2010	2009-2010	653357	1804971	\$7,527.69	
October 19, 2010	2008-2009	597974	1699536		\$697,220.00
October 19, 2010	2008-2009	597967	1699625		\$7,640.03
October 19, 2010	2007-2008	552505	1536942		\$677,580.00
October 19, 2010	2007-2008	550941	1555019		\$6,900.69
October 19, 2010	2006-2007	520538	1482638		\$570,733.13
Totals:				\$1,409,944.92	\$1,960,073.85
Grand Total:				\$3,370,018.77	

The East Central Board of Cooperative Educational Services ("ECBOCES") is requesting a reconsideration of the decision to deny and recover funds by USAC that states ECBOCES did not run a fair and open competitive bidding process and, alternatively, a waiver of the newly adopted rules, should they apply, with respect to gifts. ECBOCES is respectfully requesting the FCC to review the circumstances surrounding USAC's decision to deny and recover funds based on gifts received from its current service provider, Trillion Partners, Inc. ("Trillion").

ECBOCES is requesting considerations for hardship, equity, and the ineffective implementation of overall policy. Furthermore, the ECBOCES would like the FCC to consider that there are no allegations of, nor did anything constitute, waste, fraud, or abuse of the E-rate program. For the reasons discussed below, the ECBOCES, with the assistance of its legal counsel, respectfully requests that the FCC reverse the USAC's denial and rescission of the above-referenced funding applications and commitments.

INTRODUCTION

The ECBOCES serves approximately 9,400 students in grades K-12 and roughly 560 classroom teachers from twenty-one (21) rural East Central Colorado school districts. It is the local education agency for its member districts, with its primary work devoted to providing special education and related services to students with disabilities, educational opportunities to other students, and professional development for the educational staff of all ECBOCES member school districts.

The schools of the member districts are characterized as isolated, small, and rural, with a predominately low-income student population. ECBOCES schools are located in communities

along the East I-70 corridor with a broad geographic range from 26 miles to 180 miles from Denver. The school districts on the I-70 corridor begin with Bennett, 35 miles east of Denver, and continue to Burlington, near the Kansas border. Along the I-70 corridor, the ECBOCES includes the school districts of Strasburg, Byers, Deer Trail, Agate, Limon, Arriba-Flagler, Hi Plains, Stratton, and Bethune. North of I-70, the ECBOCES includes the school districts along Highway 36 of Woodlin, Arickaree, Liberty, and Idalia. South of I-70, the ECBOCES includes the school districts of Elizabeth, Kiowa, Karval, Genoa-Hugo, Kit Carson, and Cheyenne County.

The communities' populations range from 35 to 4,000 people with school district enrollment sizes from 60 to 3,000 students (for our largest regional school). The ECBOCES covers nearly 15,000 square miles and includes farming and ranching communities, as well as newly sprouting commuter suburbs east of Denver. Severe drought conditions for the past seven years have directly contributed to the financial struggles of the communities, school districts, and families in this area. The economic environment has contributed to declining enrollment and increased poverty rates, especially in the eastern, more rural areas where higher commodity, fuel, and energy costs have had a devastating impact.

The ECBOCES has used the Video Networking for Education and Training System ("VNET" or "VNETS") since 2006 to connect 26 classrooms in 17 school districts for the purpose of offering distance learning opportunities to the students and leveraging dollars from limited school district budgets to provide the best educational opportunities possible. Given the economic circumstances of the ECBOCES and the communities it supports, it could not have provided the VNET services without E-rate funding. The ECBOCES member school districts are exactly the type of school districts that the E-rate program was designed to help.¹

The ECBOCES has been extremely conscientious in complying with all laws and regulations applicable to the E-rate program. In all the years of its operations, it has never had an audit exception. Given this unblemished record, it has come as a complete shock to the ECBOCES and all of its school districts that USAC would deny two years of pending applications and rescind three past years of E-rate funding commitments.

There is little question that loss of well over three million dollars will have devastating consequences for the ECBOCES, likely forcing its dissolution and, with that, the termination of all manner of services to its member school districts. It simply does not have and could not obtain such a sum. As described below, however, the ECBOCES believes that it has fully complied with all applicable rules and should not be forced into dissolution by USAC. It has complied with all state and local rules regarding bidding and the acceptance of gifts. It conducted a fair and open competitive bidding process in selecting Trillion as its service provider. Most importantly, there has been no evidence or even an allegation of waste, fraud or abuse or misuse of funds or failure to adhere to the core program requirements.²

¹ *AT&T v. FCC*, 582 F.2d 490, 492 (3d Cir. 2009); see also *Computer Consulting & Network Design, Inc. v. USAC*, 2008 WL 2435932 * 1 (W.D. Ky.).

² See 22 F.C.C.R. 5296, 5300 (FCC 2007).

If the Commission determines that the ECBOCES has somehow violated one of the rules or regulations governing the E-rate program, the ECBOCES requests that the Commission waive application of the rule for the years in question, as the special circumstances in this case warrant deviation from the general rule, and such deviation would better serve the public interest.

SUMMARY OF ISSUE

On October 6, 2010, USAC issued denials for the above-referenced Form 471 applications and funding requests from funding years 2009-2010 and 2010-2011.³ Following that, on October 19, 2010, USAC issued the above-referenced rescissions for funding years 2006-2007, 2007-2008, and 2008-2009.⁴

The amount of funding commitment that USAC has now denied is \$1,409,944.92, and the amount that USAC would propose to recover is \$1,960,073.85. Accordingly the total funding denied or rescinded by USAC is \$3,370,018.77. As described below, USAC's denial and rescissions are unjustified.

In its denials of the funding year 2009-2010 and 2010-2011 funding requests USAC stated:

This FRN is denied because the documents provided by you and/or your vendor indicates [sic] that there was not a fair and open competitive bid process free from conflicts of interest. The documentation provided by you and/or your service provider indicates that prior to/throughout your contractual relationship with the service provider listed on the FRN, that you were offered and accepted either gifts, meals, gratuities, [sic] entertainment from the service provider, WHICH resulted in a competitive process that was no longer fair and open and therefore funding is denied.⁵

USAC's rescission letters similarly stated:

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During the course of a review, documentation provided by you and/or your vendor indicated that there was not a fair and open competitive bid process free from conflicts of interest. The documents provided by you and/or your service provider indicate that, prior to/throughout your contractual relationship with the services provider listed on the FRN, you were offered and accepted gifts, meals, gratuities, or entertainment from the service provider, which resulted in a competitive process that was no longer fair and open. Therefore, the commitment has been rescinded in full and

³ October 6, 2010 Funding Commitment Decision Letters from USAC, attached hereto as Exhibit 1.

⁴ October 19, 2010 Notification of Commitment Adjustment Letters from USAC, attached hereto as Exhibit 2. Note that only page 4 of the Letter related to Form 471 Application Number 597974 was received from USAC.

⁵ Ex. 1 at pp. 3, 6, 9, and 12.

USAC will seek recovery of any disbursed funds from the applicant and service provider.⁶

The denial and rescission materials do not provide any specific facts or legal basis as sufficient grounds for USAC's action. Over one year prior to receiving the denials, the ECBOCES received an inquiry from USAC regarding gifts. It responded to this inquiry on July 14, 2009, and received no additional communications from USAC until nearly a year later. In June 2010, the ECBOCES received a letter in which Ms. Gaurangi Shah from the Schools and Libraries Division of USAC made accusations relating to the receipt of gifts from Trillion Partners, Inc. by ECBOCES employees. She described in her letter that she believed that those gifts "tainted" the competitive bidding process relating to Form 470 #383320000607969.⁷ This Form 470 relates to Centrex telephone services. It was posted on December 22, 2006, with an allowable contract date of January 19, 2007, for funding year 2007-2008. In her letter, Ms. Shah made no mention to Form 470 #788110000581938. This Form 470 relates to VNET services and was posted on January 19, 2006, with an allowable contract date of February 16, 2006, for funding year 2006-2007. In fact, the ECBOCES received no notice at all that USAC planned to deny all the FRNs associated with the VNET Form 470. The ECBOCES' response to Ms. Shah's letter is attached hereto as Exhibit 4.

It is especially questionable that USAC did not notify the ECBOCES of its planned denials and rescissions of the FRNs associated with the VNET 470 because those FRNs account for \$3,339,973.25, which is the vast amount of the total sum now at issue.

Given the lack of specifics contained in the denials and rescissions themselves, the ECBOCES assumes that the USAC actions were based on the issues raised in Ms. Shah's letter, and by similar arguments relating to the VNET Form 470. Accordingly, this appeal references that letter and addresses the accusations contained therein. It assumes that the allegations contained in Ms. Shah's letter are the basis for denying all of the VNET and Centrex FRNs. This appeal also responds to the general accusation that the ECBOCES did not conduct a competitive bidding process.

TIMELINE OF EVENTS AND SUMMARY OF EVIDENCE

USAC apparently obtained two spreadsheets from Trillion⁸ containing information regarding "Total \$ to Customer," that were presented to the ECBOCES as attachments to Ms. Shah's June 4, 2010 letter. The first of these spreadsheets summarizes costs from 2004 and 2005 (prior to the VNET Form 470). The second spreadsheet summarizes costs from 2006 (after the VNET contract, but before the Centrex Form 470). The ECBOCES has no supporting documents from USAC or Trillion to validate the spreadsheets, but believes that they do not justify USAC's action, even assuming the numbers are correct.

⁶ Ex. 2 at pp. 1, 5, 9, 13, and 17.

⁷ June 4, 2010, letter from Ms. Gaurangi Shah, attached hereto as Exhibit 3.

⁸ These spreadsheets were included with Ms. Shah's letter. See *supra* note 7 and Ex. 3 at pp. 4-5.

According to the spreadsheets, on October 15, 2004, an ECBOCES employee received a lunch worth \$8.61 from Trillion. Nearly a year later, on July 27, 2005, an ECBOCES employee received a breakfast worth \$9.97 from Trillion. Both of these meals are permitted even under the new regulations, as discussed below. On November 20, 2005, an ECBOCES employee may have received a \$50 gift certificate to a local restaurant. However, the ECBOCES cannot determine which employee, if any, actually received the gift certificate, and does not believe that it was ever actually used, even if received. Regardless, as explained below, this gift would not taint the competitive bidding process. Nothing else was received by any ECBOCES employee prior to conducting the VNET competitive bidding process in early 2006.

Again, referring to the spreadsheets, on July 21, 2006, an ECBOCES employee received a breakfast worth \$6.98. Like previous meals, this breakfast would meet even the standards codified in the new regulations. From July 26, 2006 to July 28, 2006, an ECBOCES employee attended the local Visionaries in Technology Education Counsel ("VTEC") workshop to become familiar with the technology that Trillion provided to its existing customers, including the ECBOCES. By providing these workshops, Trillion trained the person engaged in the day-to-day maintenance of its systems. In doing so, for less than \$450, Trillion saved thousands in costs associated with sending a Trillion employee to serve the ECBOCES every time maintenance was required. The workshop thus saved Trillion and the E-rate program substantial sums of money. As described below, the workshop was in the context of an existing customer relationship, consistent with standard industry practice and in full compliance with Colorado law.⁹ There was no guidance from USAC or from any other source that an ECBOCES employee's attendance at the VTEC training workshop would taint a competitive bidding process.

On July 31, 2006, various ECBOCES employees may have received \$10 Starbucks gift cards from Trillion, and on December 11, 2006, an ECBOCES employee received a lunch valued at \$8.27. These were compliant even with the new regulations. Finally, on December 18, 2006, Trillion's spreadsheet indicates that some unidentified ECBOCES employees may have received two gift cards in the amount of \$25 each. The ECBOCES has located and returned to Trillion one of the two gift cards.¹⁰ It does not know the location of the other gift card or if that card was ever received or used. As described below, even if the other gift card was used, USAC had no basis to determine that a single \$25 gift card tainted the competitive bidding process for all, approximately \$3.4 million, of the ECBOCES E-rate subsidies.

Other evidence presented by USAC with Ms. Shah's letter includes an email from May 5, 2008, containing an invitation to a conference in Austin, Texas. No ECBOCES employee attended this conference. USAC also presented a December 13, 2006, email where Trillion passed along to the ECBOCES publically available information relating to a Form 470 that was accessible online. An email from February 6, 2007, relates to negotiations between the ECBOCES and Trillion regarding the Centrex phone system. In that email, Floyd Beard, Executive Director of the ECBOCES wrote, "Our choice is to adhere to the 471 deadline of

⁹ See COLO. REV. STAT. §§ 24-18-104(1)(b) and (3)(b)-(f).

¹⁰ See Letter from ECBOCES to Trillion and photocopies of the unused Target gift card attached hereto as Exhibit 5. Calling the phone number on the back of the card confirms that the card was never used.

February 7, 2007 to make this decision [regarding which vendor to choose], sign the contract and apply for e-rate regardless of the vendor we choose.” The email thus specifically contemplated that a competitive bidding process was ongoing. USAC also provided additional emails between Trillion and the ECBOCES from December 2007, January 2008, and February 2008. None of these emails have anything at all to do with any services that Trillion has provided the ECBOCES under the E-rate program or otherwise. Extremely importantly, USAC presented no emails that were sent prior to the VNET Form 470, which was posted 11 months prior to the December 13, 2006, email.

THE COMMISSION’S REGULATIONS PROMULGATED ON SEPTEMBER 28, 2010 ARE NOT RETROACTIVE

On September 28, 2010, the FCC issued its Sixth Report and Order, for the first time codifying standards related to E-rate applicants receiving gifts. As described below, even if the new regulations applied to a bidding process that took place many years ago, the ECBOCES generally would not be in violation of them. Nevertheless, it is important to note that the Commission may not apply its new regulations to bidding processes that occurred before those regulations were promulgated.¹¹ The Commission’s Sixth Report and Order provides, “Accordingly, we amend section 54.503 of our rules to prohibit E-rate applicants from soliciting or accepting any gift or other thing of value from a service provider participating in or seeking to participate in the E-rate program.”¹² The use of the words “amend” and “prohibit” recognizes the prospective applicability of the new regulations rather than the intent for them to apply retroactively or for them to “clarify” existing rules.¹³

A strong presumption exists against retroactive application of regulations.¹⁴ Accordingly, substantive administrative rules and regulations like those promulgated recently by the Commission apply only to conduct that occurs after their effective date.¹⁵ A congressional grant of rule-making authority will never be understood to encompass the power to promulgate retroactive regulations unless that power is expressly conveyed by Congress.¹⁶ Here, Congress did not, in any way, grant the Commission the power to promulgate retroactive regulations relating to the competitive bidding process.

¹¹ *Sweet v. Sheahan*, 235 F.3d 80 (2d Cir. 2000); *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009); *Moses v. Providence Hosp. & Medical Centers, Inc.*, 561 F.3d 573 (6th Cir. 2009).

¹² FCC Sixth Report and Order, FCC 10-175, para. 88 [hereinafter Sixth Report and Order]. Also, note that nowhere does this Report and Order cite to any authority in existence prior to its issuance that prohibited the receipt of *de minimis* gifts.

¹³ *Hicks v. Federal Bureau of Prisons*, 603 F.Supp.2d 835 (2009).

¹⁴ *Sweet v. Sheahan*, 235 F.3d 80 (2d Cir. 2000); *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009); *Moses v. Providence Hosp. & Medical Centers, Inc.*, 561 F.3d 573 (6th Cir. 2009).

¹⁵ *Dolese Bros. v. State ex rel. Oklahoma Tax Com’n*, 2003 OK 4, 64 P.3d 1093 (Okla. 2003).

¹⁶ *Durable Mfg. Co. v. U.S. Dept. of Labor*, 578 F.3d 497 (7th Cir. 2009); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148 (2d Cir. 1999); *Orr v. Hawk*, 156 F.3d 651, 1998 FED App. 0281P (6th Cir. 1998); *University of Iowa Hospitals & Clinics v. Shalala*, 180 F.3d 943, 136 Ed. Law Rep. 186 (8th Cir. 1999).

Accordingly, although the ECBOCES did not generally violate even the new requirements, it was required to meet only the previous opaque guidelines for gifts. Those guidelines were confined only to a since-revised USAC PowerPoint presentation that provided in the relevant part, "Know and follow your state and local rules regarding acceptance of gifts."¹⁷ As discussed in further detail below, the ECBOCES complied with all local and state laws with respect to the competitive bidding process and regarding the acceptance of gifts.

COMPETITIVE BIDDING PROCESS BACKGROUND

An elected representative from each school district attended a board meeting of the ECBOCES' board to approve the contracts with Trillion. None of these board members were at all associated with any gifts, meals, workshops, or anything else of alleged value provided by Trillion. Trillion was the only bidder for the VNET Form 470, and was the lowest bidder for the Centrex Form 470. There were no other bidders for the VNET Form 470 because of the expansive rural geography encompassed by the ECBOCES. To our knowledge, Trillion was and remains the only company to provide the VNET types of services to rural Colorado communities. Noting this, the ECBOCES' board drove a very hard bargain to ensure that the ECBOCES got the lowest price for the VNET services. Without Trillion, these services simply would not be possible, and the now interconnected rural schools that the ECBOCES supports would be left isolated again. Thus, if Trillion is now "damaged goods," in USAC's view because of a nominal 2006 gift card, there is no doubt that all of the students in the ECBOCES' member school districts will suffer.

THE FEDERAL GIFTS STANDARDS DID NOT APPLY, BUT WERE NEVERTHELESS MET

Ms. Shah's June 4, 2010 letter asserted, "In 2004, 2005, and 2006, the value of the gifts that individuals received exceeds the federal gifts standards of \$20/person/occasion not to exceed \$50/person/per calendar year." The federal gifts standards do not apply to the ECBOCES employees.¹⁸ However, even if they did, the total value of any alleged "gifts" received in 2004 was \$8.61. This was reported on the spreadsheet as a "Business Lunch with Customer."

¹⁷ This phrase still appears in the PowerPoint presentation located at:

<http://www.usac.org/res/documents/sl/ppt/2009-training/2009%20Issues%20in%20Competitive%20Bidding.ppt>, a copy of which has been attached hereto as Exhibit 6.

¹⁸ 5 C.F.R. § 2635.204 provides:

"(a) Gifts of \$20 or less. An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed \$50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, the employee may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20. Where the aggregate value of tangible items offered on a single occasion exceeds \$20, the employee may decline any distinct and separate item in order to accept those items aggregating \$20 or less."

5 C.F.R. § 2635.102 provides:

"(h) Employee means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. It includes employees of a State or local government or other organization who are serving on detail to an agency, pursuant to 5 U.S.C. 3371, et seq. For purposes other than

The total received in 2005 was \$9.97 by one individual described as a “Business Breakfast with Customer,” and, allegedly, a \$50 gift card. The ECBOCES cannot confirm who, if anyone, received any such card and, indeed, Ms. Shah fails to identify any such employee in her June 4, 2010 letter. This \$50 gift, if it was even received and used, does not exceed even the current annual gift limit. Although a \$50 gift card exceeds the single gift limit now in place, it is important to note that two \$20 gift cards and one \$10 gift card given over the course of a few days would not exceed the gift limit. Thus, even under the new regulations an employee may receive \$50 without any taint to the competitive bidding process. In late 2005 there were no such regulations, but it is telling that exactly the same compliant result could have been achieved by providing three cards instead of just one.

The only gifts received in 2006 were ten \$10 Starbucks gift cards to different individuals and two \$25 Target gift cards to different individuals. The ECBOCES has located and returned one of the two Target gift cards.¹⁹ Accordingly, although the federal standards did not apply, all gifts complied with the standards or exceeded the standards by an insignificant amount (*i.e.*, \$5²⁰). Moreover, even if the federal standards applied to the one \$25 gift card that the ECBOCES cannot locate, the remedy is return of the gift (*i.e.*, return of \$25),²¹ not an assumption of conflict of interest. Again, the new Commission regulations relating to the receipt of gifts do not apply to transactions that occurred four years ago.

In Ms. Shah’s letter, she seemed to include, “meals . . . and travel” in her definition of “valuable gifts.” The expenditures made in July 2006 relating to meals, lodging, and transportation were not “gifts.” They were instead expenses paid in the normal course of business for the training of the ECBOCES’ newly-hired technology employee, Jarred Masterson, pursuant to the existing contract the ECBOCES had with Trillion that was signed in February 2006 for the provision of a wide area network. These expenses had nothing at all to do with the subsequent Form 470 that was filed for Centrex telephone services months later. Significantly, the ECBOCES’ status at the time of all the 2006 disbursements was that of an “existing customer,” as shown on the Expense Summary.²² It is and remains common practice for service providers to train new technology employees of their customers in the technologies relating to the services they provide. The training provided to Mr. Masterson was consistent with this common practice, and thus was not a “gift.” Mr. Masterson was able to secure that training to the benefit of the ECBOCES and its students.

Again, the new Commission regulations cannot be retroactively applied to activity occurring four years ago, but even if they could be, the training provided to Mr. Masterson was

subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.” (Emphasis added.)

¹⁹ See Ex. 5.

²⁰ Even under the new regulations, the FCC, it seems, would abuse its discretion if it were to deny over \$3.3 million of funding because of one gift in an amount \$5 over the new ceiling that was made over four years prior.

²¹ 5 C.F.R. § 2635.205.

²² See Expense Summary. Ex. 3 at p. 5.

not any type of “gift, gratuity, favor, entertainment, loan or other thing of value.”²³ The term “other thing of value” must be read in context of the list it follows. Read in its context, the training was simply not in the same category of the types of gratuities that the Commission now seeks to prohibit.

THERE WAS NO DISBURSEMENT OF \$325 IN GIFT CARDS TO THE ECBOCES

Ms. Shah’s letter stated:

Finally, we note that according to Trillion’s records, four days prior to the posting of your Form 470 # 383320000607969, which resulted in the award of a multi-year contract with Trillion, you received \$325 in gift cards from the company.²⁴

The amount of the gifts that Ms. Shah referenced is incorrect. “Total \$ to the Customer” column on the Expense Summary indicates that the ECBOCES allegedly received only two \$25 gift cards, totaling \$50, not \$325.²⁵ The ECBOCES can confirm that one \$25 gift card was received, and has not been used. As noted above, it has now been returned to Trillion.²⁶ Any second gift card would have been provided because the ECBOCES was a current, existing customer of Trillion at the time and it was the holiday season. The gift card was very similar to the type of gift contemplated by the \$20/\$50 standards, in that it exceeded the \$20 ceiling by a mere \$5 and that it did not violate the \$50 maximum. It is important to note again here that the new \$20 ceiling did not apply to the ECBOCES more than four years ago.

However, if \$20 does not create a conflict of interest even under the new regulations, it is hard to imagine that \$25 somehow automatically triggers a conflict of interest (as USAC implied). Moreover, the idea that one additional \$5 gift made four years ago (when there was no prohibition on the receipt of such gifts) should now cause the denial of over \$3.3 million of funding seems capricious at best.

All expenses in 2006 were consistent with the ongoing contractual relationship that the ECBOCES already had with Trillion. They had absolutely nothing whatsoever to do with the Form 470 that was filed in December of 2006.

ACCEPTANCE OF GIFTS DOES NOT NECESSARILY CREATE A CONFLICT OF INTEREST AND DID NOT IN THE ECBOCES’ RELATIONSHIP WITH TRILLION

Again, referring to Ms. Shah’s letter, she asserted:

Although these gifts may be acceptable under state law or local regulation, the Federal Communications Commission has specifically determined that for another applicant [sic] that the offer and acceptance of gifts while allowable under local

²³ 47 C.F.R. § 54.503(d)(1) (new version).

²⁴ Ex. 3 at p. 1.

²⁵ Ex. 3 at p. 5.

²⁶ See Ex. 5.

law does not mitigate the conflict of interest that is created when you accepted the gifts, and therefore, you did not run a fair and open competitive bidding process, free from conflicts of interest as required by FCC rules.²⁷

We believe that Ms. Shah was asserting that the Commission had “specifically determined” that the acceptance of gifts automatically creates a conflict of interest. There was no such guidance from the Commission, which is confirmed by the Commission’s Sixth Report and Order. Published more than two months after Ms. Shah’s letter, that report provides: “Accordingly, we *amend* section 54.503 of our rules *to prohibit* E-rate applicants from soliciting or accepting any gift or other thing of value from a service provider participating in or seeking to participate in the E-rate program.”²⁸

In addition, the USAC website nowhere provided such guidance. USAC had and continues to have a PowerPoint presentation on its website that specifically provides, “know and follow your state and local rules regarding acceptance of gifts.”²⁹ This statement specifically contemplated that gifts could be received under certain conditions. Moreover, the certifications contained on Forms 470 and 471 were not violated. In particular, the ECBOCES did not violate the certification, “Additionally, I certify that the entity or entities listed on this application have not received anything of value or promise of anything of value, other than the services and equipment sought by means of this form, from the service provider, or any representative or agent thereof or any consultant in connection with this request for services.” Nowhere is or was “anything of value” defined. However, this term could not possibly include *de minimis* gifts or else it would conflict with even the new regulations. Further, as noted above, the available guidance regarding the receipt of *de minimis* gifts provided only that state and local rules should be followed.

The ECBOCES understands that compliance with state and local rules in the receipt of gifts is not dispositive, but as further indication of its commitment to ethical standards and conduct in all matters, including the competitive bidding process, the ECBOCES would like to point out that the following are not considered gifts of substantial value, and thus can be accepted by a local government employee under Colorado law: “an occasional nonpecuniary gift, insignificant in value;” “reimbursement for actual and necessary expenditures for travel and subsistence for attendance at a convention or other meeting at which the . . . employee is scheduled to participate;” “acceptance of an opportunity to participate in a . . . meeting which is offered to such . . . employee which is not extraordinary when viewed in light of the position held by such . . . employee;” and “items of perishable or nonpermanent value, including, but not limited to, meals, lodging, [and] travel expenses.”³⁰

As described above and in the sections below, no gifts were received by the ECBOCES that tainted the competitive bidding process.

²⁷ Ex. 3 at p. 1.

²⁸ Sixth Report and Order, *supra* note 12, para. 88 (emphasis added).

²⁹ Ex. 6 at p. 18.

³⁰ COLO. REV. STAT. §§ 24-18-104(1)(b) and (3)(b)-(f).

THERE WAS A COMPETITIVE BIDDING PROCESS

In her letter, Ms. Shah concluded, “Finally, based on the pattern of gifts received, the entire competitive bidding process based on Form 470 #383320000607969 is tainted and all FRNs referencing that Form 470 will be denied.”

The above statement has no factual basis. The competitive bidding process was not tainted, but instead complied with all terms and conditions associated with a *bona fide* competitive bidding process that was fair and open.

First, the ECBOCES well understood that 47 C.F.R. § 54.504 provided, “an eligible school, library, or consortium that includes an eligible school or library shall seek competitive bids, pursuant to the requirements established in this subpart.”³¹ Accordingly, it filed Form 470, and timely filed Form 471. The ECBOCES complied with all of the terms and conditions associated with those forms, and certified twice under oath, “All bids submitted will be carefully considered and the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor, and will be the most cost-effective means of meeting educational needs and technology plan goals.”³² The ECBOCES notes that there was no provision in the regulations prohibiting the receipt of *de minimis* gifts or any gifts at all for that matter.

Second, the ECBOCES understood that “[a] fundamental requirement of the E-rate program is that solicitation for services be based on a fair and open competitive bidding process that is free from conflicts of interest.”³³ Accordingly, it referenced USAC’s website providing, “‘Fair’ means that all bidders are treated the same and that no bidder has advance knowledge of the project information. ‘Open’ means there are no secrets in the process – such as information shared with one bidder but not with others – and that all bidders know what is required of them.”³⁴ “[T]he applicant should not have a relationship with a service provider prior to the competitive bidding that would unfairly influence the outcome of a competition or would furnish the service provider with ‘inside’ information or allow it to unfairly compete in any way. For example, a conflict of interest exists when the applicant’s consultant is associated with a service provider that is selected and is involved in determining the services sought by the applicant and the selection of the applicant’s service provider(s).”³⁵

Trillion did not have advance knowledge of the project information, and all prospective bidders were treated the same. Accordingly, the competitive bidding process was “fair.” There were no secrets in the process, and all bidders knew what was required of them; all requirements were listed on the Form 470. Accordingly, the competitive bidding process was “open.” The

³¹ 47 C.F.R. § 54.504(a).

³² 47 C.F.R. § 54.504(b)(2)(vii), (b)(3)(xi); *see also* 47 C.F.R. § 54.511(a).

³³ *Request for Review of a Decision of the Universal Service Administrator by Lazo Technologies, Inc., et al.*, File Nos. SLD-360412, *et al.*, CC Docket No. 02-6, para. 5.

³⁴ <http://www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx>. A copy of USAC’s webpage Information, Step 3: “Open a Competitive Bidding Process” is attached hereto as Exhibit 7. *See* Ex. 7 at p. 3.

³⁵ *Id.*

ECBOCES' relationship with Trillion was, and remains, a professional contractual relationship. It is not the type of relationship that would allow Trillion to unfairly compete in any way. Trillion was not involved in determining the services the ECBOCES sought or in the selection of its providers.

The E-rate program contact person did not and does not have any affiliation with any of the ECBOCES' providers. The ECBOCES' requirements on Form 470 were not at all adjusted to meet Trillion's needs, and Trillion played absolutely no role whatsoever in the development of those requirements. The parties remained at arm's length throughout the competitive bidding process. An e-mail attached to Ms. Shah's letter is itself an example of evidence confirming that arm's-length negotiations regarding the terms of the contract with Trillion took place.³⁶ "As the Commission found in the *Aberdeen School District Order*, the goal of the competitive bidding process is to ensure that E-rate funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available."³⁷ The ECBOCES' competitive bidding process ensured that E-rate funding would not be wasted.

In short, there is no indication that the bidding process was not open, fair, and competitive nor that the contracts resulting from the process resulted in any waste, fraud, or abuse.

MS. SHAH CITED NUMEROUS FCC ORDERS WHICH ARE ENTIRELY DISTINGUISHABLE

Ms. Shah listed four Commission orders to stand for the proposition that "FCC rules require applicants to conduct a fair and open competitive bidding process free from conflicts of interest." As outlined below, those orders each have material facts that are clearly distinguishable from the facts surrounding the ECBOCES' Form 470. None of these involved alleged gifts and none stand for the proposition that gifts or meals of inconsequential value to an existing customer could automatically result in denial or rescission of FRNs.

1. *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.* [SLD Nos. omitted], CC Docket Nos. 95-45, 97-21, Order, 10 FCC Rcd 6858, ¶ 60 (2003).

This appeal was denied because the school district did not list with any particularity the services that it required. Accordingly, potential bidders had to contact the school district directly to figure out what it was looking for. The ECBOCES' Form 470 listed with particularity the services that we required. Ms. Shah did not accuse the ECBOCES of failing to provide sufficient information on Form 470.

³⁶ Ex. 3 at p. 7.

³⁷ *Request for Review of a Decision of the Universal Service Administrator by Albert Lea Area Schools, Albert Lea, Minnesota, et al.*, File Nos. SLD-517274, et al., CC Docket No. 02-6, para. 8 (internal citation omitted).

2. *Request for Review of Decisions of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 94-45, Order, 16 FCC Rcd 4028-4032-33, ¶10 (2000).

This appeal was denied because Form 470 was signed by a MasterMind employee who was also listed as the contact person for the competitive bidding process. As discussed above, the ECBOCES' E-rate program contact person did not and does not have any affiliation with any of the ECBOCES' providers.

3. *Request for Review of Decisions of the Universal Service Administrator by SEND Technologies LLC, Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 07-1270 (2007).

In this case, the appeal was denied because the contact person was a 15% owner in the service provider. Again, the ECBOCES' contact person did not and does not have any affiliation with any of its providers.

4. *Request for Review of Decisions of the Universal Service Administrator by Caldwell Parish School District, et al., Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 08-449 (2008).

Here, the appeal was denied because the service provider completed Forms 470 for a number of potential clients and sent all the forms to USAC from the same address. Trillion did not complete the ECBOCES' Form 470, and it was sent to USAC by the ECBOCES.

None of the cases cited in Ms. Shah's letter provide any hint of the proposition that receipt of *de minimis* gifts removed eligibility for the E-rate program.

Responses to Ms. Shah's Questions

Ms. Shah also asked for responses to specific questions. Those questions and the ECBOCES' responses to those questions are listed below:

- *"Based on the documentation provided to USAC in its review, Sadie Walley issued an invitation to Jarred Masterson to the 2008 VTEC conference, hosted and paid by Trillion. Did a representative from ECBOCES attend that event? If so, was the travel paid for by Trillion? Please provide supporting documentation with your answer. (See Save the Date.pdf)"*

Response: "Neither Mr. Masterson nor anyone else from our staff attended the 2008 VTEC conference."

- *"In December 2006 through February 2007, ECBOCES and Trillion engaged in a [sic] conversations about the posting of the Form 470 for the phone services as well as the bid. Examples of these emails are attached in Phone bid.pdf. Please*

explain why you thought that it was appropriate for Trillion to provide advice on the filing of the Form 470 and if, during the negotiations of the contract, you provided similar detailed feedback to other potential bidders."

Response: "The cited information was sent by Gary Gasseler on behalf of Trillion as a follow up to a conversation in which Trillion's managed Centrex service was mentioned. As is evident from the document, Mr. Gasseler's e-mail contained actual, selected clips of public information available for download and review from multiple pages on USAC's Schools and Libraries website. This information was of interest to us at the time as the existing phone private branch exchange (PBX) was nearing the end of its usable life. Mr. Gasseler's reference to schedules and information on USAC's website was in no way advice on what or how we should complete or file Form 470. It was instead simply forwarded excerpts of information publically available on USAC's website, which was provided as a professional courtesy. The information contained in Form 470 was developed by our staff including [Floyd Beard]; Jarred Masterson, Director of Technology; and Dale Kanack, E-rate program coordinator.

We were and continue to be committed to a fair and open competitive bidding process that will result in the most effective use of funding available for any project. After the filing of the Form 470 (#383320000607969), we received only Trillion's bid. Had there been other bidders, we would have provided similar detailed feedback to ensure that we obtained the best price possible."

- *"In an email dated January 23, 2008, Scott Smyth indicates that VoIP Product Addendum allows ECBOCES to offer the VoIP services to all of its members but that ECBOCES is under no financial obligation until it submits a Service Order Request to Trillion, and that ECBOCES can "just wait for one of its school district to let you know they're ready for services." (see VoIP Agreement.pdf) This appears to indicate that all of the member schools in the consortium had not agreed to purchase the VoIP services that ECBOCES applied for. Please provide documentation for each of your members that specifically authorized the filing of for VoIP services prior to the filing of the application. This documentation at a minimum, must include the Name and Title of Consortium Leader, Name of Consortium Member, Printed Name, Dated Signature and Title of authorized person at member entity, Dates that indicate the agreement is/was/will be in effect either during the Form 471 application process or the actual funding year and the services that the consortium member authorized you to seek discounts on."*

Response: "Form 470 # 919850000655187 was filed based on input from our Technology Advisory Group, comprised of employees of various member school districts. It was filed on December 26, 2007. There are a number of FRNs for FY 2008: 1699625, 1728649, 1726367, 1728723, 1699536, 1726540, 1726561, 1699575, and 1726494. None of the FRNs relate to the referenced Form 470. The Technology Advisory Group continued discussions with their home districts and decided that most districts were not interested in doing VoIP on a BOCES-wide basis. Accordingly, no Form 471 was filed, and no FRNs were issued relating to the referenced

Form 470. (See also USAC/SLC website where Form 471 Application 612490 is listed as incomplete.)”

REQUEST FOR WAIVER

As discussed above, the ECBOCES believes that it has not violated either the spirit or the text of any applicable rules in conducting its bidding processes in the past. To the extent, however, that the Commission would conclude that there is any question about that, the ECBOCES respectfully requests, alternatively, that the Commission waive its rules and reverse the denials and rescissions accordingly. The Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest.³⁸ In deciding whether to waive a rule, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁹

The ECBOCES bases its request for waiver on both hardship and equity. Nearly \$3.4 million is a massive amount of money for the ECBOCES to have to pay. There is no question that its students will suffer if it is required to pay this sum. It most likely will be forced to dissolve, as it would be incapable of meeting that substantial claim. Payment of this amount will have a lasting and dramatic impact on the struggling rural communities that the ECBOCES serves. As the Commission will undoubtedly know, the amounts have been disbursed over the last three years directly to Trillion, as the ECBOCES’ service provider. Trillion, in turn, borrowed and invested the lion’s share of that in the infrastructure that would serve the expansive ECBOCES geographic region during the term of the contract. The ECBOCES has no viable legal or practical remedies to recover or pay the amounts in issue nor to provide an alternative method of serving the students, staff, and school communities.

It would also be entirely inequitable to rescind or deny nearly \$3.4 million of funding due to (1) a single gift that the ECBOCES does not even know was actually received, which occurred more than four years ago, was in an amount only \$5 more than the Commission’s new regulations permit, and was below even the new annual limits, and (2) a single gift the ECBOCES does know was actually received, which occurred more than five years ago and did not exceed the current annual limits. It would likewise be inequitable to rescind or deny nearly \$3.4 million of funding because an ECBOCES employee attended a single workshop in the context of an existing business relationship with the provider, which also occurred over four years ago.

The inequity is especially stark when one considers the total lack of any guidance whatsoever that would have implied that *de minimis* gifts meeting state law standards were prohibited. In fact, USAC specifically contemplated that gifts could be given on its website. The advice regarding gifts to “know and follow your state and local rules” was not ambiguous.

³⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), affirmed by *WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972); *Request for Review of the Decision of the Universal Service Administrator by Bishop Perry Middle School, New Orleans, LA, et al.*, File Nos. SLD-487170, CC Docket No. 02-06, FCC 06-54 para. 6 (internal citations omitted).

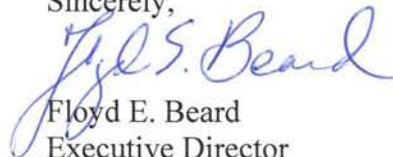
The goal of the E-rate program is to increase schools' access to advanced telecommunications technologies,⁴⁰ and the program has been designed to provide the greatest assistance to districts with the greatest need.⁴¹ The ECBOCES, with its member districts' high number of students qualifying for free and reduced price lunches, serves precisely the types of district's that E-rate was intended to help. It would fly in the face of the policy underlying the E-rate program to uphold the denials and rescissions of the USAC based upon what are, at best, *de minimis* violations of rules only recently adopted. For these reasons, if the Commission does not see fit to reverse USAC's rescissions and denials on the grounds that it misapplied the rules then in existence, we respectfully request that the Commission grant the ECBOCES a waiver of those rules.

CONCLUSION

The ECBOCES respectfully submits that the denial and rescissions of funding commitments by USAC was erroneous. In fairness, the ECBOCES should not be subject to recently-revised guidance and regulations from the Commission, but, regardless, would have substantially, if not actually, complied with the letter and spirit of the new regime. It is possible that the ECBOCES may have received one gift of \$25 four years ago and another gift of \$50 more than five years ago. Neither of these gifts exceeded the current annual limit for gifts even under the new regulations, and both complied with existing USAC and state guidance. The ECBOCES' competitive bidding processes were not "tainted" by the receipt of these gifts. Importantly, those making final decisions regarding choice of provider did not receive anything of value at all.

Accordingly, the ECBOCES respectfully requests that the Commission reverse USAC's denials and rescissions.

Sincerely,



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⁴⁰ *AT&T*, 582 F.3d at 492.

⁴¹ *Computer Consulting & Network Design*, 2008 WL 2435932 at *1.

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Exhibits:

1. Funding Commitment Decision Letters
2. Notification of Commitment Adjustment Letters
3. Letter, dated June 4, 2010, from Gaurangi Shah, USAC
4. ECBOCES' response to Ms. Shaw, dated July 6, 2010
5. Letter from ECBOCES to Trillion and photocopies of the unused Target gift card
6. USAC "Issues in Competitive Bidding," PowerPoint Presentation
7. USAC's webpage Information, Step 3: "Open a Competitive Bidding Process"